Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
	)	
Telephone Consumer Protection Act of 1991	)	

REPLY COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") hereby submits these Reply Comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") in the above captioned proceeding.[1] The FNPRM seeks comment concerning the proper duration of the Commission's proposed "safe harbor" period, during which telemarketers will not be liable for violating the Commission's rule prohibiting the placement of autodialed or prerecorded calls to numbers recently ported from wireline subscribers to wireless services ("intermodal ports"),[2] and whether the Commission should amend its safe harbor provisions for telemarketers to mirror any amendment made by the Federal Trade Commission ("FTC") to the safe harbor provisions of the FTC's Telemarketing Sales Rule ("TSR").[3] The comments overwhelmingly agree that the Commission should adopt a

[1] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Further Notice of Proposed Rulemaking, FCC 04-52 (released March 19, 2004).

[2] 47 C.F.R Section 64.1200(a)(1)(iii) (prohibiting the placement of telemarketing calls to "any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.")

[3] 47 C.F.R. Section 64.1200 (d)(3) ("Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-

safe harbor period of no fewer than thirty (30) days in which telemarketers must remove intermodal ports from their call lists, and should mirror any amendment adopted by the Federal Trade Commission to the cognate safe harbor provision of the FTC's telemarketing sales rule.

The comments show that while progress has been made toward creating a ported number database since 2003, when the Commission issued its *TCPA Order*[4], none of the solutions cited by the Commission in that Order will enable telemarketers to update their call lists instantaneously when consumers port their wireline numbers to wireless services. The Commission has observed and the comments convincingly show that when a number is ported to a wireless service, a telemarketer will not have immediate access to the porting information needed to avoid calling the new wireless number.[5] Even if it is possible to establish a direct link to NeuStar's database of ported wireless service numbers, carriers and telemarketers will experience significant time lags throughout the process, during which consumers who have recently ported wireline numbers to wireless services could receive prohibited calls from telemarketers.[6] As the American Teleservices Association ("ATA") states, "The record now

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call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date such request is made.")

[4] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd 14014, 14109-17 (2003) (*"TCPA Order").*

[5] FNPRM paras. 47-48 and fn. 102. See e.g. Comments of BellSouth, p. 2 ("It is axiomatic that the Commission should not seek to punish entities where compliance with a rule is unreasonable and it is unreasonable for an entity to maintain real-time updated databases with all ported wireless numbers.) See also Comments of Cingular Wireless, p. 3; NASUCA, p. 3; SBC, p. 2; Sprint, p. 2.

[6] Currently, telemarketers do not have a direct link to the Number Portability Administration Center ("NPAC") database. Instead, it is anticipated that NeuStar will take downloads from its NPAC database and create a separate, secure database of numbers to which telemarketers will have access. Telemarketers will then be able to access the secure NeuStar web site and receive a bulk data download of the ported numbers. Comments of NeuStar, p. 2.

amply demonstrates that mechanisms existing at the time of the *TCPA Order* are insufficient to allow telemarketers to address WLNP issues."[7]

The record in this proceeding shows that in recent months, the challenges in identifying and scrubbing ported wireless numbers from marketing lists have increased significantly. Since November 2003, when the Commission's wireless number portability rules went into effect, several million numbers have been ported, including numerous intermodal ports, and not without incident.[8] As thousands of newly ported wireless numbers appear in the system each week, accurate identification of intermodal ports becomes increasingly difficult.[9] Once an intermodal port is completed and confirmed, each ported wireless number must then be recorded and placed in the NPAC database. In order to identify numbers that have been ported from wireline subscribers to wireless subscribers who may not be called, intermodal ports must be identified and sifted from this vast pool of ported numbers. NeuStar confirms that it is developing an "Intermodal Ported TN Identification Service," a web-based service that will ultimately be capable of providing information identifying intermodal ports that is cumulative in nature and is updated in real time.[10] Until such a service becomes widely available, however, companies will continue to struggle to meet these challenges.[11]

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[7] Comments of ATA, p.2. See also Comments of Direct Marketing Association ("DMA") p. 1; Neustar, pp. 1-2.

[8] See, e.g. *Wireless Portability Complaints: Approximately 6,640 Consumer Complaints Since Porting Began on November 24,* News Release (March 30, 2004). See also Comments of BellSouth, CC Docket No. 95-116, filed January 20, 2004, pp. 21-22; Qwest, pp. 10-11; SBC, p. 13.

[9] See http//www.npac.com at NFG_Transactions_Forecasting_Model_v3.0.xls_docs.

[10] Comments of NeuStar, pp. 2-3 ("Over the past several months, NeuStar and representatives of the telemarketing industry have been working together to define the data

The comments exhibit particular concern with numbers that have not yet appeared on a "do not call" list when an intermodal port is requested.[12] Subscribers are adding their numbers to "do not call" lists and customers are seeking to port their wireline numbers to wireless services in increasing numbers. In order to avoid violations of the Commission's rules, telemarketers must update their lists of numbers to reflect intermodal ports that must not be called. To accomplish this "scrubbing" of their lists in less than thirty days, telemarketers must obtain lists of recently ported numbers on an ongoing basis, and must incorporate this information into their databases at top speed.

While some telemarketers may obtain updated lists of recently ported numbers from the NPAC, and may have the resources to sift through such lists and incorporate changes expeditiously, most telemarketers either obtain lists of recently ported numbers from third parties, or forward their own lists to third parties to be "scrubbed" periodically.[13] Even under

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product that is needed to ensure compliance with the TCPA. In response to input and specific requests from the telemarketing industry, NeuStar is currently developing a service that will be made available to subscribers in a web-based format.")

[11] Comments of AT&T, pp. 7-9; ATA, pp. 3-4; BellSouth, pp. 2-3; Call Compliance, p. 3; Cingular Wireless, p. 3; DMA, pp. 1-2; NASUCA, p.3; NeuStar, p. 2; SBC, p. 2; Sprint, p. 2. Cf. Comments of MCI, pp. 4-5 (the Commission must first ensure that AT&T Government Solutions has undertaken appropriate measures to maintain the accuracy of the national list.")

[12] See, e.g. Comments of AT&T, p. 8; ATA, p. 5; Sprint, p. 3. A wireline number that appears on a "do not call" list will not be removed from that list when it is ported to a wireless subscriber. The number will continue to appear on lists provided to telemarketers as a wireline number that telemarketers should not call.

[13] At present, several different entities may be involved in the storage, retrieval and transmission of data concerning intermodal porting, including: NeuStar; large carriers, such as SBC; service bureaus, such as Verisign or Telcordia; and industry groups, such as CTIA, DMA or Accenture, as well as the telemarketer. The "hand-off" of such information from entity to entity is time consuming as well, since each "hand-off" involves a batching process that accumulates and generates data to a transmission medium, such as an electronic file or a web location. See Comments of ATA, pp. 4-5; Countrywide, p. 6; DMA, p. 5.

ideal circumstances, telemarketers who request updated lists of ported numbers from third parties are highly unlikely to receive and incorporate these lists into their systems within seven days, and are likely to experience difficulty in meeting a deadline of thirty days.[14] In these circumstances, there is no reason to believe that the current "safe harbor" period of the Commission's telemarketing rules, which allows telemarketers up to thirty days to remove numbers from calling lists once telemarketers are notified that a customer does not wish to be called,[15] should be curtailed if the Commission adopts the proposed limited safe harbor for intermodal ports.

To prevent companies from incurring liability arising from circumstances over which they lack control, the FCC should adopt a safe harbor period that would require companies to update and scrub their call lists no more frequently than every thirty days. The comments are virtually unanimous in arguing that the safe harbor period should be at least this long.[16] As several comments note, a minimum thirty-day safe harbor will not adversely affect consumers in any significant respect: instead, this approach will strike an appropriate balance between the interests of consumers and compliance burdens imposed on telemarketers and other businesses,

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[14] Comments of AT&T, pp. 8-9; ATA, p. 2 ("Even carriers with direct access to numbering resources have experienced tracking difficulties arising from WLNP becoming a reality.")

[15] 47 C.F.R. Section 64.1200(d)(3) ("Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date such request is made.")

[16] Comments of ATA, p. 4 (31 days); BellSouth, p. 2 (30 days); Cingular Wireless, p. 4 (31 days); Countrywide, p. 6 (3 days); DMA, p. 3 (30 days); MCI, at 9-10 ("a reasonable safe harbor period that would afford telemarketers adequate time to obtain data on recently ported numbers and to remove such numbers from their call lists"); NASUCA, p. 3 (30 days unless there is a technology available that updates the ported number database in less time) SBC, p. 2 (up to 31 days); Sprint, p. 2 (no less than 30 days, with 45 days preferred).

including increased frequency of scrubbing, down time costs, and lost revenues as operations are suspended to replace old lists with new lists that have been scrubbed.[17] In addition, as ATA notes (at 5) a thirty-day safe harbor "will allow companies to merge scrubbing efforts for WLNP purposes with those for DNCR purposes. . . . A more frequent WLNP safe harbor requirement -- which would result from a shorter safe harbor period such as seven (7) days - -would only unduly increase costs."

The Commission (FNPRM, para. 52) has also asked whether it should amend the current "safe harbor" provision of its telemarketing rules[18] to mirror any amendment adopted in the pending rulemaking by the Federal Trade Commission to the cognate safe harbor provision of that agency's Telemarketing Sales Rule ("TSR").[19] The comments overwhelmingly agree that the Commission should conform its safe harbor interval to the FTC's proposed amendment to the TSR.[20] As the FNPRM recognizes (para. 52), Congress has instructed the Commission to

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[17] Comments of ATA, pp. 5-6; BellSouth, pp. 2-3; Cingular Wireless, p. 4; DMA, p. 3; NASUCA, p. 3; SBC, p. 2.

[18] 47 C.F.R. § 64.1200(c)(2)(i)(D). Currently, both the Commission and the FTC have adopted safe harbor regulations applicable to the national do-not-call ("DNC") registry that require a telemarketer to employ a version of the national DNC list obtained no more than three months prior to the date of a telemarketing call.

[19] 16 C.F.R. Section 310.4(b)(3)(iv). In January 2004, Congress mandated that the FTC amend the TSR to require that telemarketers access the national DNC list, and purge numbers in the registry, every month. See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 188 Stat. 3 (January 23, 2004), Division B, Title V. The FTC has thus initiated a rulemaking to amend the TSR in accordance with its statutory obligation, and in that proceeding is proposing to adopt a requirement that telemarketers obtain the national DNC list thirty days prior to making any telemarketing call. See Telemarketing Sales Rule, RIN 3084-0098, Notice of Proposed Rulemaking, 60 F.R. 7330 (February 13, 2004) ("FTC NPRM").

[20] American Council of Life Insurers, p. 1; ATA, p. 9; BellSouth, p. 4; Cingular Wireless, p. 4; DMA, p. 3; NAR, p. 2; NASUCA, p. 5; SBC, p. 3; Sprint, p. 3.

"maximize consistency" with the FTC's telemarketing rules.[21] Failure on the Commission's part to mirror the FTC's 30 day standard would create markedly differing obligations for entities subject to the two agencies' differing spheres of authority over telemarketers.[22] There is no justification for the Commission to create such a disparity between its safe harbor provision and the FTC's impending amendment to its own rule.

The record in this proceeding makes clear that the Commission's new rule should take effect no earlier than January 1, 2005, the effective date specified by the FTC for its revised rule.[23] The comments show that in conforming its safe harbor rule to the FTC's rule, the Commission must recognize that the federal government and the industry will require a reasonable interval to modify their practices to reflect this change in the regulation.[24] In addition, the FTC has noted that the national DNC registry will require logic changes and modifications to account for the increased traffic that will result from the reduction in the safe

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[21] See Do-Not-Call Implementation Act, P.L. 108-10, 117 Stat. 557 (2003), Section 3. Congress has recognized that it is not possible for the Commission to adopt rules that are identical to those of the FTC in every instance. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report on Regulatory Coordination, DA 03-2855 (September 8, 2003)("FCC Report to Congress"), citing H.R. Rep. No. 108-8 at 4, reprinted in 2003 U. S. Code Congressional & Admin. News, 688, 671. However, the Commission has acknowledged the need for coordination with the FTC to eliminate unnecessary inconsistencies. See, e.g. FCC Report to Congress, para. 23 (identifying inconsistency between the respective agencies' rules for measuring satisfaction of call abandonment standards).

[22] As the Commission observes (para. 52 and fn. 113), in addition to common carriers, the FTC lacks jurisdiction over telemarketing by financial institutions (banks, credit unions, savings and loans), insurers and airlines. By contrast, the Commission exercises jurisdiction over all telemarketers' calls.

[23] See *Telemarketing Sales Rule* 69 Fed. Reg. 16368, 16371 (2004).

[24] See, e.g. Comments of AT&T, pp. 10-11; ATA, pp. 9-10; MCI, p. 5.

harbor rule's download interval.[25] Telemarketers will also require a reasonable period in which to implement changes in their systems, modify their methods and procedures, and conduct training of their telemarketing personnel regarding the revised safe harbor provision.[26] In no event should the Commission adopt an effective date for its own safe harbor rule change that diverges from the effective date of the FTC amendment. Such a discrepancy would create exactly the kind of inconsistency that Congress has instructed the Commission to avoid.

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[25] FTC NPRM, 69 F.R. p. 7331.

[26] Id.

CONCLUSION

The comments demonstrate convincingly that any safe harbor the Commission adopts should provide telemarketers with a minimum of thirty days in which to obtain data on numbers ported from wireline services to wireless services and to scrub these numbers from their call lists, and that the Commission should mirror any amendment adopted by the Federal Trade Commission to the cognate safe harbor provision of the FTC's telemarketing sales rule.

Respectfully submitted,

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